

DEC 6 1977

MICHAEL ROGAN, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.: 77-809

VERNON LEE JOE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

**To the Supreme Court
Of the Commonwealth of Virginia**

Richard George Brydges
1369 Laskin Road
Virginia Beach, Virginia 23451
Attorney for the Petitioner

Commonwealth's Attorney
County of Southampton,
Boykins, Virginia 23827

TABLE OF CONTENTS

	<i>Page</i>
CITATION TO OPINION BELOW	1
JURISDICTION	1, 2
QUESTIONS PRESENTED.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2, 3, 4
STATEMENT OF CASE.....	4, 5
HOW THE QUESTION WAS RAISED AND DECIDED BELOW.....	4, 5
REASONS FOR GRANTING WRIT	5, 6
CONCLUSION.....	7
CERTIFICATE	7
APPENDIX A – ORDER DENYING PETITION FOR WRIT.....	8
APPENDIX B – COMMUTATION OF SENTENCE.....	9

TABLE OF CASES

	<i>Page</i>
<i>Gregg v. Georgia</i>	
44 U. S. L. W. 5320 (U. S. July 2, 1976)	5
<i>Jurek v. Texas</i>	
44 U. S. L. W. 5262 (U. S. July 2, 1976)	5, 6
<i>Roberts v. Louisiana</i>	
63 So. 2nd 339	5
<i>Williams v. Oklahoma</i>	
44 U. S. L. W. 3761 (U. S. July 6, 1976)	5
<i>Woodson v. North Carolina</i>	
44 U. S. L. W. 5267 (U. S. July 2, 1976)	5

STATUTES

	<i>Page</i>
Virginia Code Section 53.291(1)	
Code of Virginia, 1950, as amended	2, 4
Virginia Code Section 53-228.1	
Code of Virginia, 1950, as amended	3, 6
Article 5, §12, Constitution of Virginia	3
United States Constitution, VIII Amendment	3
United States Constitution, XIV Amendment	4

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.:

VERNON LEE JOE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Virginia entered on September 9, 1977.

CITATION OF OPINION BELOW

The opinion of the Supreme Court of the Commonwealth, though not issued in written form, in Record Number 770431 of the records of the Supreme Court of Virginia, and is set out in Appendix A attached hereto at page 8, *infra*.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on September 6, 1977 and is set out in Appendix A hereto.

Jurisdiction of this Court is involved under §28 U. S. C. 1257 (3), petitioner having asserted below and asserting here deprivation of his rights as secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Did the trial court err in overruling the defendant's motion to quash the indictment under which the defendant was charged.

2. Did the trial court err in enforcing the Governor's order to commute the death penalty to the defendant to a life sentence prior to sentencing the defendant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Code of Virginia, 1950, as amended, §53.291(1).

"It shall be unlawful for an inmate in a penal institution as defined in §53-9 or in the custody of an employee thereof to do the following:

1. To kill, wound or inflict bodily injury upon (a) such employee or (b) any person lawfully admitted to such penal institution, except another inmate, or (c) who is supervising or working with inmates . . .

An inmate guilty of such killing as is mentioned in this section, or any act therein mentioned from which death ensues to such employee or person shall be guilty of first degree murder and be punished by death. If the employee or person be injured and death not ensue, then the inmate shall be guilty of a felony and be punished by confinement in the penitentiary for a term of not less than three nor more than twenty years. For any other offense mentioned in this section or §53-292 the inmate shall be guilty of a felony and he shall be punished by confinement in the penitentiary not less than

one nor more than five years which sentence shall be served after the end of the term for which he shall then be subject to confinement."

2. Code of Virginia, 1950 as amended, §53-228.1:

"No pardon before conviction; commutation of capital punishment. The Governor shall not grant a pardon in any case before conviction. In any case in which he shall exercise the power conferred on him to commute capital punishment, he may issue his order to the superintendent of the penitentiary, requiring him to receive and confine (and the superintendent shall receive and confine) in the penitentiary according to such order, the person whose punishment is commuted. To carry into effect any commutation of punishment, the Governor may issue his warrant directed to any proper officer; and the same shall be obeyed and executed." (Code 1950, §19-271; Code 1950 (Repl. Vol. 1960), §19.1-297; 1960, C. 366; 1972, C. 145)

3. Constitution of Virginia, Article V, §12 — Executive Clemency.

The Governor shall have power to remit fines and penalties under such rules and regulations as may be prescribed by law; to grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution; and to commute capital punishment.

He shall communicate to the General Assembly, at each regular session, particulars of every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting or commuting the same.

4. Constitution of the United States, Amendment VIII.

(Bails, Fines, Punishments)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

5. Constitution of the United States, Amendment XIV.

(Citizenship Rights not to be
Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**STATEMENT OF THE CASE
HOW QUESTION WAS RAISED
AND DECIDED BELOW**

The petitioner, Vernon Lee Joe, was charged with killing Captain Ronald Albert Barnes, a prison guard in the employ of Southampton Correctional Center, in violation of §53-291(1) of the Code of Virginia, 1950, as amended. A conviction under this statute requires the mandatory imposition of the death penalty. Joe was also charged with the robbery of Barnes, the robbery of one Alfred Lynch and an attempted escape from the aforesaid penal facility.

A preliminary hearing was held in the General District Court of Southampton County on May 21, 1975, and the matter was certified to the Grand Jury. The Grand Jury subsequently returned a True Bill on all four charges on July 21, 1975.

The defendant was tried on all four charges on June 7, 8, and 9, 1976, in the Circuit Court of Southampton County. During the early morning hours of June 9, 1976, the jury returned its verdict. Vernon Joe was found not guilty in the

robbery of Alfred Lynch. However, the jury found him guilty of killing Ronald Albert Barnes and affixed his punishment automatically as death by the electric chair. The jury also found him guilty of robbing Barnes and of attempted escape and affixed his punishment at five years in confinement and two and one-half years in confinement, respectively.

Subsequent to the jury rendering their verdict, a motion was made by the defense counsel to set aside the verdict. Oral argument was heard on the motion on September 21, 1976. The motion was over-ruled by the Court and Vernon Joe was sentenced on December 3, 1976.

REASONS FOR GRANTING THE WRIT

The first basis for this petition for a writ of certiorari is that the petitioner was convicted under a constitutionally impermissible statute. Prior to the trial motions were made by the defense to quash the indictment under which the defendant was tried based on the statute involved being unconstitutional. All such motions were overruled and the petitioner was tried and found guilty.

Subsequent to the guilty verdict, but prior to the sentencing of the petitioner, this Court rendered a group of five landmark decisions concerning the constitutionality of a mandatory death sentence. *Gregg v. Georgia*, 44, U. S. L. W. 5320; *Jurek v. Texas*, 44, U. S. L. W. 5262; *Roberts v. Louisiana*, 44, U. S. L. W. 5281; *Williams v. Oklahoma*, 44, U. S. L. W. 3761; *Woodson v. North Carolina*, 44, U. S. L. W. 5267. In these cases the Court very specifically stated that statutes which unequivocally require capital punishment for violation of one of a list of enumerated offenses is unconstitutional under the protection afforded by the Eighth and Fourteenth Amendments. Section 53.291(1) of the Code of Virginia, 1950, as amended, is identical to the statutes which have previously been held constitutionally impermissible by this Honorable Court.

It appears perfectly clear that the Court now requires a bifurcated proceeding prior to his sentencing but was denied same.

In the *Jurek* case, the Court specifically held that "individualized sentencing determination [is] . . . required by the Eighth and Fourteenth Amendments" and that "mandatory laws [imposing the death penalty are therefore] unconstitutional." *Jurek v. Texas*, 44, U. S. L. W. 5262, 5264 (U. S. July 2, 1976).

The second issue which the petitioner wishes to present to the Court is whether or not the Governor of the Commonwealth of Virginia had authority to commute the petitioner's sentence to one of life imprisonment. The Governor is given authority to commute capital punishment to life imprisonment under Article V, §12 of the Constitution of Virginia and under §53-228.1 of the Code of Virginia, 1950, as amended. However, in the case at bar, the defendant had not been sentenced on October 20, 1976, the date of the order commuting the sentence. In effect, there was no sentence to commute and the Governor lacked the legislative authority to take such action. The Governor's action usurped both legislative and judicial functions and denied the defendant his due process rights to a fair and impartial trial in its entirety.

CONCLUSION

Petitioner prays that the Petition for Writ be granted.

RICHARD GEORGE BRYDGES,
Attorney for the Petitioner

Richard George Brydges
1369 Laskin Road
Virginia Beach, Virginia 23451

CERTIFICATE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed to Richard G. Grizzard, Commonwealth Attorney for the County of Southampton, Boykins, Virginia 23827, this 10th day of December, 1977.

RICHARD GEORGE BRYDGES

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 6th day of September, 1977.

The petition of Vernon Lee Joe for a writ of error and supersedeas to judgments rendered by the Circuit Court of Southampton County on the 3rd day of January, 1977, in prosecutions by the Commonwealth against the said petitioner for felonies (Indictments Nos. 119-75, 120-75 and 121-75), having been maturely considered and a transcript of the record of the judgments aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgments complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgments of the said circuit court.

Record No. 770431

A Copy,

Teste:

Howard G. Turner, Clerk

By:

Deputy Clerk

APPENDIX B

COMMONWEALTH OF VIRGINIA

EXECUTIVE DEPARTMENT

To All to Whom These Presents Shall Come — Greeting:

WHEREAS at a Circuit Court held in and for the County of Southampton in the month of June, in the year one thousand nine hundred and seventy-six,

VERNON LEE JOE

was convicted of murder of a prison guard and his punishment fixed at death by the jury:

THEREFORE I, Mills E. Godwin, Jr., Governor of the Commonwealth of Virginia, have, by virtue of authority vested in me, commuted and do hereby commute the said punishment so imposed to imprisonment in the Penitentiary for the term of life.

Given under my hand and under the Lesser Seal of the Commonwealth at Richmond, this 20th day of October, in the year of our Lord one thousand nine hundred and seventy-six, and in the 201st year of the Commonwealth.

/s/ Mills E. Godwin
Governor of Virginia

By the Governor: /s/ Patricia R. Perkinson

Secretary of the Commonwealth

In The
Supreme Court of the United States
October Term, 1977

No. 77-809

VERNON LEE JOE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
TO GRANT OF CERTIORARI

MARSHALL COLEMAN

Attorney General of Virginia

THOMAS D. BAGWELL

Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

TABLE OF CONTENTS

	<i>Page</i>
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT	2
CONCLUSION	5
CERTIFICATE OF SERVICE	5
APPENDIX A	6

TABLE OF CITATIONS

Cases

Bowen v. State, 488 S.W.2d 373 (Tenn. 1972)	4
Gregg v. Georgia, 428 U.S. 153 (1976)	2, 4
Jefferson v. Commonwealth, 214 Va. 747, 204 S.E.2d 58 (1974)	3
Jurek v. Texas, 428 U.S. 262 (1976)	2
Lewis v. Commonwealth, 218 Va. 31 S.E.2d (1977)	3, 4
Roberts v. Louisiana, 428 U.S. 325 (1976)	2, 4
Rose v. Hodges, 423 U.S. 19, <i>Reh. den.</i> 423 U.S. 1092 (1975)	3, 4
Smith v. Commonwealth, 134 Va. 589, 113 S.E. 707 (1922)	4
Washington v. Commonwealth, 216 Va. 185, 217 S.E.2d 815 (1975)	3

	<i>Page</i>
Whan v. State, 485 S.W.2d 275 (Tex. 1972)	4
Williams v. Oklahoma, 428 U.S. 907 (1976)	2, 4
Woodson v. North Carolina, 428 U.S. 280 (1976)	2, 4

Statutes

Virginia Code § 53-251, Code of Virginia (1950), as amended	3
Article V, § 12, Constitution of Virginia	4

In The
Supreme Court of the United States
 October Term, 1977

No. 77-809

VERNON LEE JOE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION
 TO GRANT OF CERTIORARI**

OPINION BELOW

There is no reported opinion of the Supreme Court of Virginia. The order rejecting the petition for writ of certiorari is set forth in petitioner's Appendix A.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

- I. Did The Trial Court Err In Overruling The Petitioner's Motion To Quash The Indictment At Trial Under Which The Petitioner Was Convicted?
- II. Did The Governor Have The Power To Commute The Petitioner's Sentence Of Death To Life In The Penitentiary Prior To The Trial Court's Pronouncement Of Judgment On The Jury's Verdict?

STATEMENT OF THE CASE

The respondent accepts the petitioner's statement of the case.

ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

- I. The Court Did Not Err In Overruling The Petitioner's Motion To Quash The Indictment.

Petitioner has argued that the trial court should have quashed the indictment because the statute under which the petitioner was tried was unconstitutional. The petitioner states that after the verdict of the jury but prior to petitioner's sentencing this Court rendered five decisions: *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Williams v. Oklahoma*, 428 U.S. 907 (1976); and *Woodson v. North Carolina*, 428 U.S. 280 (1976), which hold that statutes requiring mandatory death penalty for enumerated offenses are unconstitutional without proper guidelines for the sentencing authority. However, the respondent states that the holdings in the above cases did not *ipso facto* invalidate the petitioner's sentence nor do the holdings declare Virginia's statute unconstitutional. It may be that Virginia's statute would have been declared unconstitutional upon ap-

plication to the proper court. This was discussed by the Virginia Supreme Court in *Lewis v. Commonwealth*, 218 Va. 31, 37, S.E.2d (1977), when a similar issue was raised. Under Virginia law at the time this case was tried the statute in question had been held to be constitutional. See *Jefferson v. Commonwealth*, 214 Va. 747, 204 S.E.2d 58 (1974), and *Washington v. Commonwealth*, 216 Va. 185, 217 S.E.2d 815 (1975). Assuming, for the sake of argument only, that the sentencing portion of § 53-251 is unconstitutional, this was cured by the subsequent commutation of the sentence to life in prison by the governor. At the time petitioner was tried, the court correctly overruled the petitioner's motion to quash the indictment.

- II. The Governor Had The Power To Commute The Petitioner's Sentence Of Death To Life In The Penitentiary Prior To The Court's Pronouncement Of Judgment On The Jury's Verdict.

The petitioner alleges error in the procedure followed by the trial court and the governor. The jury had convicted the petitioner of the offenses charged and rendered its verdict of death. The court took motions of the petitioner under advisement. In the interim the governor commuted the petitioner's sentence of death to life in prison.

The respondent states that the procedure followed in this case is purely a matter of State law. It is submitted that this Court should adhere to its decision in *Rose v. Hodges*, 423 U.S. 19, *reh. den.*, 423 U.S. 1092 (1975), where the Court held:

"If Tennessee chooses to allow the governor to reduce the death penalty to a term of years without resort to further judicial proceedings, the United States Constitution affords no impediment to that choice." 423 U.S. at 22.

In *Lewis v. Commonwealth, supra*, the court upheld the governor's decision to commute the death sentence of a convicted murderer in facts almost identical to the case at bar. The only difference was the trial court had pronounced judgment on the jury verdict. Whether the court had pronounced judgment on the jury verdict, however, is immaterial under Virginia's Constitution. In Virginia, the governor's authority to grant commutations arises from Article V, § 12 of the Constitution of Virginia (1971). The Governor of Virginia can commute a death sentence after conviction. The word "conviction" is necessarily given the "ordinary legal meaning" i.e., "not that judgment has been entered or sentence pronounced, but only that a verdict of guilt has been returned." *Smith v. Commonwealth*, 134 Va. 589, 595, 113 S.E. 707 (1922).

Texas has also upheld the commutation of a death sentence by a governor under facts similar to those in *Rose v. Hodges, supra*. *Whan v. State*, 485 S.W.2d 275 (Texas 1972), *cert. den.*, 411 U.S. 934 (1973). In *Whan*, the Texas court stated that the governor can commute a death sentence after the conviction, but before sentence has been imposed, 485 S.W.2d at 277 (dictum).

The respondent contends that the petitioner is not under a sentence of death where the sentence has been commuted to life in prison by the governor. The petitioner's commuted sentence, life in prison, is the only sentence to be considered. See *Bowen v. State*, 488 S.W.2d 373, 375-376 (Tenn. 1972). Since the sentence suffered by the petitioner is not violative of the standards set forth in *Roberts, Jurek, Williams, Woodson*, and *Gregg*, the respondent submits that the petition for certiorari should be denied.

The respondent states that similar issues to the issues raised in the case at bar were raised in the petition for

certiorari of Edward Alien Gooch, III, Record No. 77-468. This Court denied the petition on November 28, 1977. See Appendix A for copy of Court order.

CONCLUSION

For the foregoing reasons, the respondent respectfully submits that this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

THOMAS D. BAGWELL
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

This is to certify that I, Thomas D. Bagwell, Assistant Attorney General of Virginia, and a member of the Bar of the Supreme Court of the United States, on the 22nd day of February, 1978, mailed with first class postage prepaid a true copy of this Respondent's Brief in Opposition to Grant of Certiorari to Richard George Brydges, Esquire, 1369 Laskin Road, Virginia Beach, Virginia, 23451.

THOMAS D. BAGWELL
Assistant Attorney General

APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

November 28, 1977

ANTHONY F. TROY, Esq.
Attorney General of Virginia
Supreme Court-Library Bldg.
Richmond, Va. 23219

RE: Edwin Allen Gooch, III
v. Virginia
No. 77-468

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Mr. Justice Blackmun took no part in the consideration or decision of this petition.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ VIRGINIA M. GIBSON
Assistant Clerk